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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1152

WILLIAM J. SCOTT (as Treasurer of the State of Illinois and Member of the Illinois Electoral Board), CLYDE BEALS, DAVID DAVIS, JOSEPH R. MALLORY, WILLIAM McKNIGHT, JR., CARL SCHWEINFURTH, HAROLD B. STEELE, MRS. FAYE STRIEBINGER and the ILLINOIS AGRICULTURAL ASSOCIATION,

Appellants,

vs.

JOSEPH GERMANO, JOHN ALESIA, JOSEPH CESARIO, LEO KEEFER, RAYMOND SAROCCO, SAM E. PERISH, JOSEPH POCHERVINA, BUDDY W. DAVIS, OTTO KERNER, as Governor of Illinois and Chairman of the State Electoral Board; PAUL POWELL, as Secretary of the State of Illinois and Secretary of the State Electoral Board; WILLIAM G. CLARK, as Attorney General of the State of Illinois and Member of the State Electoral Board; and MICHAEL J. HOWLETT, as Auditor of Public Accounts of the State of Illinois and Member of the State Electoral Board,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM.

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM.

Appellees Joseph Germano, John Alesia, Joseph Cesario, Leo Keefer, Raymond Sarocco, Sam E. Perish, Joseph Pochervina and Buddy W. Davis move that this appeal be dismissed because it was not taken in conformity with

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law or, in the alternative, that the order of the United States District Court for the Northern District of Illinois be affirmed because no questions are raised by the appeal which are sufficiently substantial to require further argument.

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STATEMENT.

This case was previously before this Court in *Germano* v. *Kerner*, 378 U. S. 560. On June 22, 1964, this Court reversed the order of the court below which had dismissed the complaint and remanded the action for further proceedings consistent with the views stated in *Reynolds* v. *Sims*, 377 U. S. 533, and companion cases. The mandate of this Court was filed with the United States District Court for the Northern District of Illinois on July 20, 1964.

On July 29, 1964, Appellees Germano, Alesia, Cesario, Keefer, Sarocco, Perish, Pochervina and Davis (sometimes hereinafter for convenience referred to as the "individual Appellees") filed a motion asking the three-judge Court to set this case for hearing for the purpose of implementing said Mandate. Because the three-judge Court did not act upon this initial motion, the individual Appellees on November 12, 1964, submitted a detailed plan of implementation and a brief in support thereof.[1] Appellants and the other Appellees submitted responsive pleadings and briefs. No objection was raised by any party concerning the District Court's jurisdiction. As is shown in the Memo-

1. As was stated in the Memorandum in Support of Answer in Opposition to Motion for Accelerated Consideration of Appeal and other relief filed in this Court by the individual Appellees on May 13, 1965 (pp. 5-6), neither this second implementing motion nor the supporting brief are listed in the Table of Contents of the Record served upon the individual Appellees. The second motion, entitled Motion and Suggestions for Order on Remand from the Supreme Court of the United States, was a detailed, seven-page, proposed order and declaration of rights. The supporting brief was a twenty-page analysis of the decisions of this Court and of many of the state and federal district court decisions which have considered the question of relief. Individual Appellees are now preparing and will file a Cross-designation of the record, incorporating these and related documents.

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randum filed by the individual Appellees on May 13, 1964 (pp. 17-19), all of the Appellants expressly urged the three-judge Court to retain jurisdiction pending the conclusion of the 1965 session of the Illinois General Assembly. All of the implementation pleadings were before the three-judge Court on or before December 10, 1964.

Approximately three weeks after the individual Appellees filed their second motion seeking implementation, Appellant Scott dismissed the Attorney General of Illinois, who had represented Scott throughout these proceedings, and retained his present counsel. Substitution of counsel was completed on December 3, 1964. Appellant Scott's new counsel prepared the responsive pleadings and brief which were before the three-judge Court at the time of the entry of the order from which Appellant Scott now appeals.

The three-judge Court on January 22, 1965, issued an order implementing this Court's Mandate of July 20, 1964. It is from that implementing order that Appellants take the instant appeal.

Subsequent to their intervention into the present action and after they had filed their answer and briefs in response to our implementing motion in the Court below, Appellant Scott's present counsel substituted for Attorney General Clark as Scott's attorneys in an action pending in the Illinois Supreme Court, *People ex rel. Engle* v. *Kerner*, 32 Ill. 2d 212, 205 N. E. 2d 33. In the *Engle* case the plaintiff had filed a complaint in which he contended that the 1964 amendments to the reapportionment provisions of the Illinois Constitution had been proposed and adopted in violation of other provisions of *the Illinois Constitution.* As stated by Justice Schaefer in his dissent in the *Engle* case, "the primary contention of the relator . . . is that the *Constitution of Illinois* was not complied with in the adoption of the 1954 reapportionment amendment." (205 N. E. 2d at 41; Juris. St., Appendix B, p. 15.) (Emphasis

added.) The majority opinion of the Illinois Supreme Court discloses that Engle's complaint did not raise any federal constitutional questions or allege the violation of any provisions of the constitution or laws of the United States. (205 N. E. 2d at 34; Juris. St., Appendix B, pp. 2-3.)

On January 6, 1965, approximately one month after conceding that the three-judge Court may and should retain jurisdiction of this cause, Appellant Scott's new counsel filed Scott's first and only brief in the Illinois Supreme Court in the *Engle* case. Scott joined with the other elective state officers, all of whom were represented by the Attorney General of Illinois, in opposing each of Engle's contentions. Compare Brief for Def. Scott with Brief for Defs. Kerner, Chamberlain, Clark and Howlett, *People ex rel. Engle* v. *Kerner, supra.* However, Appellant Scott departed from the other elective state officials in urging the Illinois Supreme Court to take jurisdiction of Illinois Senate apportionment. Thus, Scott made the following argument to the Illinois Supreme Court (Brief for Def. Scott, pp. 33-39, *People ex rel. Engle* v. *Kerner, supra*):

> "A. IF THE STATE OF ILLINOIS FAILS TO REAPPORTION THE SENATE, THE FEDERAL COURTS WILL INTERVENE.
>
> "We think it plain that if Illinois fails to reapportion the Senate, the federal courts will do so. Indeed, a federal court is now being asked (in *Germano* v. *Kerner,* Civil No. 63 C 291, N. D. Ill. (on remand from U. S. Supreme Court)), to 'remedy the malapportionment existing in the Illinois Senate' in the event the General Assembly does not do so before August 2, 1965. (Plaintiffs' Motion and Suggestions for Order on Remand from the Supreme Court of the United States, p. 3.)
>
> "The decided cases disclose that federal courts do reapportion state legislatures if the State *itself* does not act. (Citing numerous cases.) . . .

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"We submit that it would be a serious and unfortunate interference with the integrity of the State if the federal courts reapportioned our Senate because the General Assembly did not do so. The State of Illinois has a deep-rooted tradition of independent self rule and does not require federal intervention to cure the State's problems of government. Accordingly, we believe that if the General Assembly fails to act, this Court should interpose and reapportion the Senate to *prevent the federal courts from dictating the Illinois Senate apportionment.* . . .

"B. THIS COURT CAN AND SHOULD REAPPORTION THE SENATE IF THE GENERAL ASSEMBLY FAILS TO DO SO.

• • • • •

"This Court is not only the final arbiter in the solution of Illinois' reapportionment problems, but signally, great and *far reaching mischief* can occur if the federal courts intrude into the area of the state law concerning legislative reapportionment. . . . The Colorado Supreme Court . . . criticized the federal court for having acted. . . .

"Other state courts, recognizing *the evil of federal intervention*, have reapportioned their state legislatures or announced that they would do so if necessary, thus foreclosing *federal encroachment.* . . .

"Similarly, the Wisconsin and Oklahoma Supreme Courts perceived the necessity of acting to *preserve their States' independence and integrity from federal control.* . . .

"[I]n the context of *Reynolds* v. *Sims* and the probability of federal intervention, reapportionment of the Senate is the most compelling circumstance for this Court to act. We respectfully request the court to do so in this case.

"C. THIS COURT SHOULD ENTER AN ORDER RETAINING JURISDICTION OF THIS CASE.

"We suggest that this Court's order in this case should recognize that the current General Assem-

bly may fail to reapportion the Senate, and thus this Court should retain jurisdiction of this cause until the end of the current legislative session. Then, if the General Assembly has not reapportioned the Senate, this Court can order the defendants, the members of the State Electoral Board, to conduct future elections of State senators in accordance with a temporary provisional Senate reapportionment map decreed by the Court. Such a map would supply the hiatus until the General Assembly enacts a valid senatorial apportionment and would *ensure no federal intervention.*" (Emphasis added.)

On February 4, 1965, out of term, the Illinois Supreme Court rendered the decision which Appellants have appended to their Jurisdictional Statement as Appendix B. The Illinois Supreme Court rejected Engle's theories in their entirety but, in compliance with Appellant Scott's request, indicated that it would retain jurisdiction of the *Engle* case. Justices Schaefer and Hershey agreed that Engle's claim was groundless but dissented as to the retention of jurisdiction. Appellants then on February 8, 1965, filed a motion in which they asked the three-judge Court to reconsider and vacate the order of January 22, 1965.

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ARGUMENT.

I.

APPELLANTS' APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT AND MUST BE DISMISSED BECAUSE IT WAS NOT TAKEN IN CONFORMITY WITH THE PROVISIONS OF APPLICABLE STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE.

A. Untimeliness.

As was briefly outlined in the Memorandum filed by individual Appellees on May 13, 1965, serious questions concerning the timeliness of Appellant's Notice of Appeal are apparent on the face of their Notice of Appeal and Jurisdictional Statement. Appellants acknowledge that they are appealing from an order entered on January 22, 1965. Since their Notice of Appeal was filed on May 10, 1965, it is clear that Appellants have not satisfied the requirements of Section 2101(b) of the Judicial Code [28 U. S. C. § 2101(b)] which establishes the time limits for direct appeals from orders of three-judge district courts. Section 2101(b) provides, as follows:

> "(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

In view of the thirty and sixty day limitations of Section 2101(b), Appellants' failure to appeal until three and one-half months had elapsed causes their appeal to be presumptively defective. The remarkable thing about their Jurisdictional Statement is that Appellants do not

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even mention the problem. Appellants cite in support of this Court's jurisdiction only 28 U. S. C. § 1253 and six cases, none of which involve the timeliness question which is inherent in this appeal. We are thus left with no explanation of how the Appellants might attempt to justify their tardiness, if indeed they can.

Although it is questionable whether Appellees should be required to speculate concerning the grounds upon which Appellants invoke the jurisdiction of this Court, we shall examine those possibilities which we can discern. There seem to be two theories upon which Appellants might rely: first, that the filing of their motion to vacate and reconsider tolled the time for appealing; and secondly, that the denial of their motion to vacate and reconsider somehow caused the January 22nd order to become appealable. In the absence of any indication concerning the position of the Appellants, we shall assume that they would have made these arguments.

In considering the effect of the motion to vacate and reconsider, the initial inquiry is whether any motion forestalls the running of the time to perfect a direct appeal from a three-judge court to this Court. Rule 72 of the Federal Rules of Civil Procedure which governs such direct appeals makes no provision for tolling the times specified in 28 U. S. C. § 2101 (b). This is in marked contrast to Rule 73 (a) which provides that a "timely motion" made pursuant to Rules 50 (b), 52 (b), 59 (b) or 59 (e) will toll the time for appeal. While there is a serious question whether such a conclusion is justifiable, there is some authority in the treatises that the tolling provisions of Rule 73 (a) are by implication incorporated into Rule 72. Assuming this to be so, it then follows that *only* a *timely* motion will have the effect of tolling the time for appeal. [7 MOORE'S FEDERAL PRACTICE §§ 72.03 (2), 72.03 (4) (2d ed. 1964).] Rule 6 (b) prohibits the enlargement of the time

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for taking any action under Rules 50 (b), 52 (b), 59 (b), 59 (d), 59 (e) and 73 (a) beyond the precise terms of those Rules. Accordingly, the courts have held that if the ten day requirements of these rules are not met, an appeal filed after the expiration of the prescribed time for an appeal must be dismissed because of untimeliness. *Wolfsohn* v. *Hankin*, 321 F. 2d 393 (D. C. Cir. 1963); *Muhs* v. *Acme-Hamilton Mfg. Co.*, 319 F. 2d 843 (3d Cir. 1963); *Schlink* v. *Chesapeake & Ohio R. Co.*, 276 F. 2d 116 (6th Cir. 1960); *Raughley* v. *Pennsylvania R. Co.*, 230 F. 2d 387 (3d Cir. 1956); and *Biggs* v. *Roberts*, 213 F. 2d 893 (7th Cir. 1954). Although the foregoing cases do not involve direct appeals, Moore asserts in his treatise that the principles established are equally applicable to direct appeals [7 MOORE'S FEDERAL PRACTICE § 72.03 (4) (2d ed. 1954)]:

> "Thus it is believed that in civil actions governed by the Rules and whether the appeal is to the Supreme Court or to a court of appeals the district court has no power to entertain a motion for a new trial after the time stated in Rule 59 (b). This reasoning would equally preclude the district court from granting a new trial on its own initiative after the time stated in Rule 59 (d), or entertaining a motion to alter or amend the judgment after the time stated in Rule 59 (e), or entertaining a motion to amend its findings or make additional findings beyond the time stated in Rule 52 (b). The same would be true relative to a motion for judgment n. o. v. under Rule 50 (b), although this case would seldom, if every arise relative to a judgment from which there is a direct appeal to the Supreme Court."

To the extent that the Appellants' motion to vacate and reconsider was not filed until seventeen days after the January 22nd order, it was untimely under Rules 50 (b), 52 (b), 59 (b) and 59 (e). If the motion is governed by any of these rules, this appeal must be dismissed.

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The next inquiry is, therefore, whether the motion to vacate and reconsider falls within one of these categories. Logic would suggest that the Appellants' motion arises under Rule 59 (e) which speaks of motions "to alter or amend" a judgment. Moore confirms this conclusion. Tracing the history of Rule 59 (e) and the cases arising thereunder, Moore defined the scope of Rule 59 (e) in the following passage [6 MOORE'S FEDERAL PRACTICE § 59.12 (1) (2d ed. 1953)]:

> "Even prior to the 1946 amendment, which added subdivision (e) to Rule 59, many motions seeking relief of the type which literally and technically might not be a motion for a new trial in an orthodox sense, as a motion for rehearing, *reconsideration*, or *vacation* of a final order terminating the action prior to any trial, were held to be subject to the provisions of Rule 59 so that a motion made more than 10 days after the entry of the judgment did not suspend its finality for purposes of appeal. (Citing cases and compilations.). . . .
>
> "Relief may be sought under Rule 59 (e) on a *timely* (emphasis in text) motion . . . to vacate a judgment of dismissal and amend the complaint (citing *Kelly* v. *Delaware River Joint Commission*, 187 F. 2d 93 (3d Cir. 1951), *cert. den.*, 342 U. S. 812); to vacate a dismissal for want of jurisdiction and amend the complaint to clarify the jurisdictional issue; and for other similar types of relief. . . .
>
> "Although the motion under (e) is to 'alter or amend' the judgment, it would perhaps be more accurate to say that subdivision (e) deals with motions to alter, amend, or *vacate*. It would be an unreasonably narrow position to hold that a judgment may be modified and amended only up to the thin line where it amounts to a vacation of the judgment altogether. The district court formerly had the inherent power to vacate any of its judgments during term time. The Rules were merely intended to abrogate term time as having any effect on the power of the district court over its

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> final judgments: not to withdraw power which it formerly had to vacate a final judgment, but to require that any action of this kind must be taken in response to a proper motion made not later than 10 days from the entry of the judgment or, if the court acts on its own initiative, that it do so not later than 10 days after the entry of the judgment. The cases have wisely recognized the power of the court to vacate and set aside a judgment under 59 (b)." (Emphasis added.)

The only other Rule under which Appellants' motion might arguably have been filed would be Rule 60 (b). It is not necessary to examine the applicability of Rule 60 (b), for it is clear that the Appellants' motion could not have tolled the time for appealing if Rule 60 (b) had been invoked. Rule 60 (b) provides that "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." Moore has observed that in view of this language a motion under "one or more of the 6 grounds stated in 60 (b) . . . does not toll the time for appeal from the final judgment." 7 MOORE'S FEDERAL PRACTICE § 60.29 (2d ed. 1954). In support of this conclusion Moore has cited the Advisory Committee's note, as well as *Saenz* v. *Kennedy*, 178 F. 2d 417 (5th Cir. 1950) and *Markert* v. *Swift & Co.*, 173 F. 2d 517 (2d Cir. 1949). In the *Markert* case the Court of Appeals for the Second Circuit was concerned with a motion to reopen a judgment and for leave to amend the complaint. The court held that the motion should have been made under Rule 59 (e), thus invoking the ten day limitation. The court observed, further, that when such a motion is made within ten days, "the running of the appeal time under FR 73 (a) is automatically suspended. Otherwise the relief must be sought under FR 60 (b) where the making of the motion does not automatically suspend the operation of a judgment. . . ." 173 F. 2d at 519. See also, *Muhs* v. *Acme-Hamilton Mfg. Co.*, 319 F. 2d 843 (3d Cir. 1963).

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The foregoing discussion of the authorities establishes beyond doubt that the filing of the Appellants' motion to vacate and reconsider did not toll the time for appealing the January 22nd order. Nor would it avail the Appellants to contend that they could not have filed the motion to vacate and reconsider within the ten day period because the Illinois Supreme Court did not render its decision until thirteen days after the January 22nd order. Appellants were well aware that the Illinois Supreme Court might interject itself, having themselves urged the court to do so. Therefore, they could have filed a motion to vacate and reconsider even before the Illinois Court ruled. The Illinois Supreme Court stated in *Engle* that "all parties . . . either request or concede that we may retain jurisdiction." 205 N. E. 2d 41; Juris. St., Appendix B, p. 14. Nothing barred the Appellants from filing a timely motion, advising the three-judge Court that the *Engle* case had been argued and that all parties had agreed to the retention of jurisdiction by the Illinois court. On the other hand, there was no requirement that the Appellants file a motion to vacate and reconsider. They had plenty of time to perfect an appeal to this Court following the issuance of the *Engle* decision. Other approaches were available to the Appellants. For example, they could have filed a Rule 60 (b) motion and asked for an expeditious ruling in advance of the expiration of their time to appeal. We point out these alternatives simply to show that the failure of the Appellants to appeal within the requisite time was avoidable. They could have accomplished the same objectives and preserved their appeal.

The alternative argument that Appellants might have made, if they had sought to explain how they could justify the filing of an appeal at this late date, is that the denial on May 7th of their motion to vacate and reconsider somehow breathed life into their appeal. It is noted that in

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both their Notice of Appeal and Jurisdictional Statement Appellants suggest that the appeal is taken from both the January 22nd order and "from the further order and decision entered by the same three-judge panel on May 7, 1965." However, the only "further order" entered on May 7th was the denial of the motion to vacate and reconsider which was manifestly untimely. Moreover, even assuming that the motion to vacate and reconsider were timely, it is clear on the face of Appellant's Jurisdictional Statement that the purpose of their appeal is not to challenge the discretion of the three-judge Court in denying the motion but is to challenge paragraphs (3) and (4) of the Order of January 22nd. Appellants concede at page 5 of their Jurisdictional Statement that they are not asking the District Court to dismiss the action or to relinquish jurisdiction. Rather, the whole thrust of the Jurisdictional Statement is that the Court below went too far in requiring that any reapportionment plan be submitted for its approval (paragraph 3) and in holding out the possibility of an at-large election (paragraph 4).

Since the Appellants are obviously appealing the merits of the January 22nd order, the reference to the May 7th denial of the motion to vacate is clearly spurious.

B. Conditional Order.

The January 22nd order of the three-judge Court contained five separate items: (1) A requirement that the members of the General Assembly be made defendants; (2) a declaration that the area features of the senate apportionment plan are invalid; (3) a requirement that any reapportionment plan be submitted to the court for approval; (4) the possibility of an at-large election; and (5) retention of jurisdiction. It is evident that the Appellants are not attacking items (1), (2) and (5) of the

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District Court's order. No mention whatsoever is made of item (1) in the Jurisdictional Statement. In the *Engle* case the Supreme Court of Illinois agreed with the court below that the area features of the senate apportionment scheme are invalid under the Mandate of this Court. And, as noted earlier, Appellants agree at page 5 of their Jurisdictional Statement that the three-judge Court need not relinquish jurisdiction. Hence, only items (3) and (4) are at issue in the instant appeal.

When one examines items (3) and (4) of the order of January 22, it becomes evident that both are conditional orders. Neither requires the immediate performance of any act. Neither enjoins the performance of any act. Item (3) does not become operative until a reapportionment plan has been effectuated. Item (4) is even more tenuous in that the court does not state that it will direct an at-large election but rather suggests that it will give serious consideration to such an order in the event the senate is not reapportioned and in the event the parties are unable to show cause why such an order should not be entered.

Paragraphs 3 and 4 of the January 22nd order are thus neither interlocutory nor final orders. In *Johann Maria Farina* v. *Roger & Gallet*, 296 F. 2d 119 (2d Cir. 1961) a very similar situation was presented. There, the district court rendered an order that the complaint would be dismissed unless the plaintiff, a German citizen, were produced for examination within ninety days. The plaintiff was not produced. However, before the complaint could be dismissed and after the ninety days had elapsed the plaintiff filed a notice of appeal. The Court of Appeals for the Second Circuit granted a motion to dismiss the appeal, stating as follows (296 F. 2d at 119):

> "We grant the motion to dismiss on the ground that there is no final judgment from which an appeal can

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be taken; the notice is thus premature, rather than too late.

"It is wholly clear under the authorities and in reason that the order was conditional and not final when entered."

We are unable to see how the instant action can be distinguished from the *Farina* case. Accordingly, as an alternative ground for dismissal, we assert that the January 22nd order is conditional and not yet ripe for appeal.

Although the limitations of space and the pressures of time were such that exhaustive research and analysis of the serious jurisdictional questions was impossible, it is submitted that the foregoing authorities are sufficiently compelling to require dismissal of this appeal. Appellants have not made even the most elementary effort to establish jurisdiction or to explain the timeliness and prematurity questions which are so manifest in their Jurisdictional Statement. We have attempted to anticipate their theories, lest this matter be finally resolved before we have had the opportunity to comment upon the jurisdictional issues. We trust that we will be accorded the opportunity to respond in the event the Appellants come forth with additional theories in support of this appeal.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THIS APPEAL.

The "substantial question" portion of the Jurisdictional Statement at pages 7-11 is entirely devoted to the reiteration of the contention that the three-judge Court and the Illinois Supreme Court are in hopeless conflict. Appellants have summarized this assertion at page 10 of the Jurisdictional Statement:

"The record before this Court presents a most un-

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> fortunate and disruptive clash between the state and federal courts concerning jurisdiction to reapportion the Illinois Senate once the Illinois legislature fails."

In their anxiety to prove that such a "clash" exists, Appellants have either misunderstood or misinterpreted the pronouncements of the three-judge Court.

At the bottom of page 7 Appellants imply that the District Court accused the Illinois Supreme Court of being presumptuous in retaining jurisdiction of Illinois senate apportionment. There is not one word in the District Court's memorandum which could possibly be interpreted as criticism of the Illinois court for retaining jurisdiction. On the contrary the three-judge Court declared that "*Engle* correctly states that the State's apportionment scheme must comply with the provisions of the Illinois Constitution *as interpreted by the Illinois Supreme Court.*" Juris. St., Appendix A, p. 21. (Emphasis added.) In implying that the federal court was critical of the Illinois court, Appellants have, perhaps unintentionally, misinterpreted the federal court's pronouncement at pages 21 and 22 of its memorandum concerning the respective roles of federal and state courts. The federal court was merely emphasizing the fact that federal constitutional questions are to be decided by federal courts. *Forty-Fourth General Assembly of Colorado* v. *Lucas*, 379 U. S. 693.

Similarly, at the bottom of page 7 and the top of page 8 of the Jurisdictional Statement it is alleged that "the court below plainly declares that once the Illinois Legislature fails to reapportion the Illinois Senate, no other branch of the State government (and specifically the Illinois Supreme Court) may do so." There is nothing in the memorandum or order of the three-judge Court which divests any state agency of any rights with respect to apportionment. The three-judge Court simply declared

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in paragraph 3 of its order that "*any* implementation, amendment or substitution of . . . effective portions of the . . . constitution or legislation be submitted to and approved by this court. . . ." (Emphasis added.) Nothing in paragraph 3 or any other part of the order or in any part of the memorandum specifies who must or can propound the Illinois reapportionment plan. The use of the word "any" in paragraph 3 of the order would, in fact, suggest that the court is not concerned about the source of the plan. In short, there is no prohibition in either the order or the memorandum with respect to the Supreme Court or any other agency of Illinois.

At the top of page 8 of the Jurisdictional Statement Appellants characterize the District Court's decision as follows:

> "The decision further declares that once the Legislature fails, the three-judge court is at once vested with primary exclusive reapportionment jurisdiction and must order an at-large election."

This characterization is entirely false. All that the three-judge Court has stated is that it will consider ordering an at-large election "in the event no such implementation, amendment or substitution of the constitutionally defective method of election of Illinois state senators is approved by this court. . . ." Nothing in the District Court's pronouncements speaks of "primary and exclusive reapportionment jurisdiction." Nothing automatically invokes the three-judge Court's jurisdiction upon the legislature's failure to reapportion. The contingency which will give rise to consideration of an at-large election is the failure to present to the court a valid reapportionment plan. The three-judge Court has given no indication in paragraph 4 of its order that it is concerned as to how or by whom a valid plan is created.

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Appellants imply at page 8 of the Jurisdictional Statement that the three-judge Court has rendered an interpretation of the separation of powers provision of the Illinois constitution. This is patently untrue. The District Court stated merely that it would not undertake the legislative function of drawing legislative district boundaries. It added that a legislature could, if it desired, function without legislative districts, *i.e.*, operate on an at-large basis. The court asserted that such an arrangement would be constitutional and that no court should countermand such a decision on the part of a legislature. In offering these conclusions, the court below was neither interpreting the Illinois constitution nor imposing any restraints upon the Illinois Supreme Court. It was simply emphasizing the obvious constitutional rule that courts cannot interfere with valid legislative determinations.

At the top of page 9 of Appellants' Jurisdictional Statement reference is made to certain cases in which state or federal courts are said to have drawn legislative maps. In passing, it should be noted that in most of the cited cases the courts did not actually draft district boundaries. In two of the cases, *Tawes* and *Scranton*, the court had nothing to do with the reapportionment *per se*. In any event, these cases are apparently cited for the purpose of supporting the right of the Illinois Supreme Court to redistrict the Illinois Senate. There is an assumption underlying the entire Jurisdictional Statement that the Illinois Supreme Court is anxiously awaiting the opportunity to redistrict the Senate. Although, as noted above, Appellant Scott asked the Illinois Supreme Court to draft "a temporary provisional Senate reapportionment map" (Brief for Def. Scott, p. 39, *People ex rel. Engle* v. *Kerner*, *supra*), the invitation was not accepted. The Illinois Supreme Court stated merely that "we retain jurisdiction of this cause for the purpose of taking such affirmative action as may be

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necessary to insure that the 1966 election is pursuant to a constitutionally valid *plan.*" 205 N. E. 2d at 41; Juris. St., Appendix B, p. 14. Not only did the Illinois Court refuse to say what it would do, but it carefully used the word "plan" rather than "map" or "districts." The only mention of redistricting on the part of the Illinois Supreme Court was in the following sentence in which the Court expressly reserved the question of "whether, in the absence of a constitutional legislatively determined plan, language in . . . United States Supreme Court decision, requires us to adopt, simultaneously, provisional reapportionment and redistricting plans for both houses." 205 N. E. 2d at 41; Juris. St., Appendix B, p. 14. Thus, when the Illinois Supreme Court's language is carefully analyzed, it becomes evident that the Illinois Court may have reservations similar to those of the three-judge Court regarding the propriety of judicial "redistricting" as contrasted to judicial "reapportionment." In any event, it is perfectly clear that there is no basic conflict between the Illinois Court's reservation of jurisdiction and the Federal Court's reservation of jurisdiction.

Finally, at the bottom of page 9 and the top of page 10 of their Jurisdictional Statement Appellants contend that the fact that this action was commenced prior to the *Engle* case is but an irrelevant happenstance. Conveniently ignored is the fact that the instant case was tried before the three-judge Court and had been pending in the Supreme Court of the United States for many months before the *Engle* case was commenced. So, too, have Appellants ignored the fact that *Engle* is and always has been an entirely unrelated action. It is hardly an irrelevant happenstance that issues were already joined in the instant case on the question of implementation of this Court's Mandate at the time that Appellant Scott first began to urge the Illinois Supreme Court to assume jurisdiction of

Senate apportionment through the medium of the *Engle* case. In any event, Appellants betray a lack of understanding of the abstention doctrine. The controlling principles were set forth by this Court in *Davis* v. *Mann*, 377 U. S. 678, 690-691, as follows:

> "Appellants' contention that the court below should have abstained so as to permit a state court to decide the questions of state law involved in this litigation is without merit. Where a federal court's jurisdiction is properly invoked, and the relevant state constitutional and statutory provisions are plain and unambiguous, there is no necessity for the federal court to abstain pending determination of the state law questions in a state court. *McNeese* v. *Board of Education*, 373 U. S. 668. This is especially so where, as here, no state proceeding had been instituted or was pending when the District Court's jurisdiction was invoked. We conclude that the court below did not err in refusing to dismiss the proceeding or stay its action pending recourse to the state courts."

Clearly, this Court's pronouncement in *Davis* v. *Mann* is controlling in the instant matter and provides support for the District Court's determination not to abstain.

We have limited our comments in support of our Motion to Affirm largely to the refutation of points raised in the Jurisdictional Statement. In our Memorandum in Opposition to the Motion for Accelerated Consideration and Other Relief, filed on May 13, 1965, a number of subjects which are pertinent to this Motion to Affirm were developed. We shall not burden the Court by repeating the comments made in that Memorandum. Rather, we shall enumerate the points that have not been fully developed in this Motion and give page references at which such information can be found in the Memorandum:

1. The Memorandum of the three-judge Court evidences complete obedience to this Court's jurisdictional guide-lines—pp. 8-10.

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2. The Illinois Supreme Court's opinion shows that the Court was unaware that the three-judge Court had rendered an implementing order—pp. 14-15.

As has been shown, the facts do not support the Appellants' contention that there is a "clash" between the state and federal courts. On the contrary, the decisions of the two courts are fully reconcilable. Even if there were areas of potential conflict, neither court has done anything at this point other than to retain jurisdiction. If the two courts were ever to become entangled, there would be ample opportunity for this Court to resolve any difference. If the Court becomes involved in what is at most an alleged, possible future problem, it will be flooded with such claims. For, in any situation in which two different courts have original jurisdiction there is always the vague possibility of a conflict.

CONCLUSION.

For the reasons herein set forth we respectfully submit that the appeal was not taken in conformity with law and presents no substantial question for the decision of this Court. We, therefore, urge that this appeal be dismissed or, in the alternative, that the order of the three-judge Court be affirmed.

Respectfully submitted,

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